

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1071

To be argued by
ALAN LEVINE

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1071

UNITED STATES OF AMERICA,

Appellee,

—v.—

CALLIE BUSH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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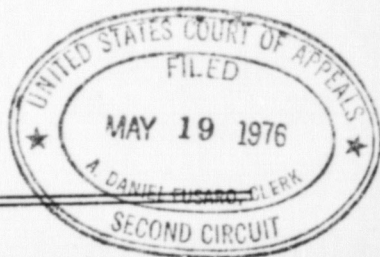


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UNITED STATES OF AMERICA,

Appellee,

—v.—

CALLIE BUSH,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Callie Bush appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 3, 1975 after a one-day bench trial before the Honorable Irving Ben Cooper, United States District Judge.

Information 75 Cr. 1048, filed November 3, 1975, charged Bush in one count with obstruction of the mails, in violation of Title 18, United States Code, Section 1701. This Information superseded Indictment 75 Cr. 468, filed May 12, 1975, which had charged Bush in one count with embezzlement of mail, in violation of Title 18, United States Code, Section 1709.

Trial commenced against Bush on November 3, 1975 and concluded that same day, when the Court found her

guilty as charged. On January 15, 1976, Judge Cooper sentenced Bush to a term of six months imprisonment, the execution of which was suspended, and placed her on probation for a period of two years.

Statement of Facts

The Government's Case

On February 10, 1975, at approximately 11:00 P.M., Inspectors of the United States Postal Inspection Service assumed various surveillance points at the United States Post Office, Midtown Station, to conduct observations and test the integrity of personnel assigned to Route 26. (Tr. 16).^{*} Arrangements had previously been made for a pink test letter, which contained eight \$1 bills and was addressed to the Carter Riley Club, 505 Eighth Avenue, New York, New York, to be placed in a letter tray for Route 26. (Tr. 16).

At 12:00 midnight when the night shift began, Callie Bush assumed her normal position in the Route 26 distribution area and commenced sorting mail. At approximately 12:35 A.M. on February 11, 1975, Bush was observed as she picked up the test letter. (Tr. 19). Rather than file the test letter in the appropriate compartment, Bush placed it underneath the other mail in her hand. After sorting the other mail, she picked up the pink envelope, removed its contents, and placed the money and envelope inside her blouse. (Tr. 19).

Shortly thereafter she was observed going to the women's bathroom. (Tr. 48). After her coffee break several hours later she was observed as she sat at her dis-

^{*} The abbreviation "Tr." refers to the trial transcript and "GX" to Government Exhibits.

tribution table and counted out several \$1 bills. The bills were then put back inside her blouse. (Tr. 21). Bush was then approached by the Postal Inspectors who had been observing her movement and was placed under arrest. After being advised of her constitutional rights, Bush removed from her person seven \$1 bills, which matched the serial numbers of the bills that had been placed in the test letter. (GX 1, 1a).

A subsequent search of the trash can in the women's bathroom uncovered the pink envelope addressed to the Carter Riley Club. The envelope had been torn into pieces. (Tr. 55).

The Defense Case

Bush took the stand and denied taking the letter addressed to the Carter Riley Club. (Tr. 70). She testified that she owed a co-worker \$7.24 for Avon Company products and that she had placed the seven \$1 bills inside her blouse before coming to work that evening. (Tr. 72).

ARGUMENT

The Defendant Was Not Entitled to a Jury Trial.

Bush argues that she was deprived of a statutory right to a jury trial or, in the alternative, that she was entitled to the trial judge's discretionary ruling as to whether she would receive a trial by jury. These claims are meritless.

The defendant correctly acknowledges that she had no constitutional right to a jury trial. (Br. at 7-8). Neither Article 3, § 2 of the Constitution, which provides that "[t]he Trial of all Crimes, except in Cases

of Impeachment, shall be by Jury", nor the Sixth Amendment, which states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" confers a right to trial by jury for a "petty offense," i.e., a misdemeanor, "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500." 18 U.S.C. § 1(3); see *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974); *Baldwin v. New York*, 399 U.S. 66, 69 (1970); *Frank v. United States*, 395 U.S. 147, 149-50 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 159-61 (1968). Since Bush's conviction was for a violation of 18 U.S.C. § 1701, which is punishable by a fine of not more than \$100 and imprisonment for not more than six months, or both, she was plainly convicted of a "petty offense" for which no constitutional right to jury trial exists.

The thrust of the defendant's argument is instead that she had a statutory right to a determination of her guilt by a jury. This argument must fail. For despite Bush's claim that she had a "statutory right to a jury trial" (Br. at 7), there is not even a hint in her brief as to what statutory provision she premises this argument upon, nor are we able to suggest one. In that circumstance, this rather blatant omission certainly renders specious any suggestion that the defendant was possessed of a statutory right to a jury trial.

At first blush, somewhat closer to the mark appears to be the unarticulated contention that the common law confers a right to a jury trial even where the Constitution does not, and, therefore, in order to deprive a defendant of a jury trial in a petty offense case, the Government must be able to point to a statute which expressly deprives the defendant of this common law right. However, this argument, too, is deficient.

First, there was no common law right to a jury trial in petty offense cases. "So-called petty offenses were tried without juries both in England and in the Colonies..." *Duncan v. Louisiana*, *supra*, 391 U.S. at 160; see Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). Indeed, in *Schick v. United States*, 195 U.S. 65, 71 (1904), it was recognized that there was no constitutional or statutory provision or "public policy" requiring a jury trial for petty offenses.

Recent decisions of the Supreme Court confirm that there is no common law right to a jury trial in petty offense cases. In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), the defendant argued he was entitled to a jury trial on charges of criminal contempt, which had resulted in the imposition of a six month sentence. In rejecting this claim, Justice Clark's opinion announcing the Court's judgment left no doubt that there existed neither a constitutional nor common law right to a jury trial:

"Over 75 years ago in *Callan v. Wilson*, 127 U.S. 540, 557 (1888), this Court stated that 'in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose,' a jury trial is not required. And as late as 1937 the Court reiterated in *District of Columbia v. Clawans*, 300 U.S. 617, 624, that: 'It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury . . .'

* * * * *

According to 18 U.S.C. § 1 (1964 ed.), '[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months' is a 'petty offense.' Since Cheff received a sentence of six months' imprisonment . . . Cheff's offense can only be treated as 'petty' in the eyes of the statute and our prior decisions. We conclude therefore that Cheff was properly convicted without a jury." 384 U.S. at 379-80.

Similarly, in *Frank v. United States*, *supra*, 395 U.S. at 151-52, the Court, relying on Justice Clark's opinion in *Cheff*, categorically held in a contempt case that, since the penalties fell within those prescribed for petty offenses in 18 U.S.C. § 1, a jury trial was properly denied.

Second, even if there were a residual common law right to a jury trial in petty offense cases—a proposition which flies in the face of English and Colonial legal history—, Congress has clearly expressed its intent to have petty offenses tried to a judge. This is evidenced first by the fact that Congress has created a statute which explicitly establishes a subclass of misdemeanors called "petty offenses,"* and the Supreme Court has recognized that this section delimits those offenses for which a jury trial is required. *Frank v. United States*, *supra*, 395 U.S. at 151; *Cheff v. Schnackenberg*, *supra*, 384 U.S. at 379-80.

* 18 U.S.C. § 1 provides:

"Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense."

Furthermore, in 1968, Congress amended the statute entitled Trial By United States Magistrates, 18 U.S.C. § 3401, and later promulgated Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, which clearly establish that there is no right to jury trial for petty offenses.* Section 3401(b) now provides that a magistrate shall explain to a person charged with a "minor offense," which includes misdemeanors punishable by imprisonment for not more than one year and a fine of not more than \$1,000, or both, that "he has a right to trial before a judge of the District Court and that he *may have* a right to trial by jury before such judge." (Emphasis added). The statute further provides that the magistrate shall not proceed to try the case unless a written consent is executed which, *inter alia*, waives "any right to trial by jury *that he may have*." (Emphasis added).

Pursuant to the enabling provision of section 3402, "The Rules of Procedure for the Trial of Minor Offenses before United States Magistrates" were amended effective January 27, 1971 to provide for the classification of both minor offenses and petty offenses as provided in 18 U.S.C. § 1 and to clarify the use of the permissive language in 18 U.S.C. § 3401(b).** Under Rule 2 for minor offenses, the Magistrate must explain to the defendant that "he has a right to trial before a judge of the district court and a jury." In contrast, Rule 3(c) (1), dealing with petty offenses, provides that the trial

* Rule 54(b) (4) of the Federal Rules of Criminal Procedure provides that proceedings involving minor offenses before United States Magistrates are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

** In a dissenting opinion to the promulgation of these rules, Justice Black, joined by Justice Douglas, opined that "By strong negative pregnant [these Rules] suggest there exists no right to jury trial . . . for 'petty offenses.'" 51 F.R.D. 197, 207 (1971).

shall be conducted before a Magistrate, as are trials of petty offenses in the district court by a district judge without a jury. Moreover, while a defendant's waiver of both trial by district court and trial by jury is required prior to a Magistrate's trial of a minor offense, a defendant charged with a petty offense need only waive trial by the district judge. Compare Rule 2(c) with Rule 3(b). As stated by the Fourth Circuit in *United States v. Merrick*, 459 F.2d 644, 646 (4th Cir. 1972), "[I]f a petty offender had the right to a jury trial in the district court, the magistrate would be required to inform him of this right because an accused can waive only a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458 (1938)."

The defendant's reliance on *United States v. Bishop*, 261 F. Supp. 969 (N.D. Cal. 1966), in support of her argument that deprivation of a jury trial in petty offense cases requires an explicit congressional enactment and that there is no such expression of congressional intent, is wholly misplaced. *Bishop* was decided before the recent trilogy of Supreme Court cases which dealt with the question of jury trials for petty offenses, *Baldwin v. United States*, *supra*, 399 U.S. 66; *Frank v. United States*, *supra*, 395 U.S. 147; and *Duncan v. Louisiana*, *supra*, 391 U.S. 145. Moreover, the District Court's conclusion that Congress had not intended to deprive a petty offender of a jury trial was based on an analysis of 18 U.S.C. § 3401 (1964), which was amended to its present form in 1968, as well as the Rules for Trial of Petty Offenses before United States Commissioners, which were amended effective January 27, 1971.

That *Bishop* is no longer persuasive authority is clearly demonstrated by the fact that since the Supreme Court's decisions in *Baldwin*, *Frank* and *Duncan*, every federal court faced with the question has held that no

constitutional or statutory right to a jury trial exists for one charged with a petty offense. *United States v. Jarman*, 491 F.2d 764 (4th Cir. 1974); *United States v. Floyd*, 477 F.2d 217, 221-22 (10th Cir.), cert. denied, 414 U.S. 1044 (1973), aff'g 345 F. Supp. 283 (W.D. Okla. 1972); *United States v. Merrick*, supra; *United States v. Cain*, 454 F.2d 1285 (7th Cir. 1972); *United States v. Rogers*, 354 F. Supp. 502, 503 (D. Colo. 1973).

Finally, relying on *United States v. Beard*, 313 F. Supp. 844 (D. Minn. 1970), Bush argues that, even if she had no right to a jury trial, the trial judge had discretion to afford her such a trial which he improperly declined to exercise. The decision in *Beard* preceded the adoption of the Magistrate's rules and, therefore, to the extent that that decision is premised on Congress' silence on the question of the availability of jury trials for petty offenses, the decision has plainly been undermined. Moreover, even putting to one side the now clearly expressed congressional intent to eliminate jury trials in petty offenses cases, it is difficult to see, in the absence of any constitutional or common law right to a jury trial, on what this supposed right to an exercise of judicial discretion is premised. The cases relied upon by Bush to require an exercise of judicial discretion, *United States v. Brown*, 470 F.2d 285 (2d Cir. 1972); *United States v. Fields*, 466 F.2d 119 (2d Cir. 1972); *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969), all involve statutes or rules which by clear implication required the trial judge to render rulings on an individual basis on such matters as sentencing procedures or bail. Here, where there is no right to a jury trial, whether constitutional or statutory, and where there is no direction from Congress requiring an exercise of discretion, the trial judge cannot be criticized for failing to employ a discretionary power he simply did not possess.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALAN LEVINE

being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *19th* day of *May*, 1976,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

*DAVID GOTTLIEB,
LEGAL AID SOCIETY
FEDERAL AFFAIRS BUREAU
15 PARK ROW
NY, NY*

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Alan Levine

Sworn to before me this

19th day of *May*, 1976

Jeanette Ann Grayeb
JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977